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IN THE

Supreme Court of the United States

No. 286

FELIX CANOVA,

Petitioner,

—v.—

THE TRAVELERS INSURANCE COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

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IN THE

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No. _____

FELIX CANOVA,

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THE TRAVELERS INSURANCE COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

May It Please the Court:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, rendered on the 29th day of January, 1969, in "Felix Canova v. The Travelers Insurance Company," No. 25,946, on the docket of said Court, and the refusal of petitioner's application for rehearing and entry of said judgment on the 28th day of March, 1969, affirming the decision of the

United States District Court for the Eastern District of Louisiana, New Orleans Division, No. CA 11-195, on the docket of said Court. The decision of United States Court of Appeals for the Fifth Circuit is reported as "Felix Canova v. The Travelers Insurance Company," 406 F.2d 410.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on the 29th day of January, 1969. Petition for rehearing was denied on the 28th day of March, 1969, with judgment being entered on said date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254, petitioner requesting a review of the decision of the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED

Whether the party pleading an affirmative defense has the duty and burden of demanding that the trial court apply and charge the jury as to said affirmative defense.

Whether 28 U.S.C. 1961 controls the question of prejudgment interest in a diversity action where the accident and injuries occurred on the territorial waters of a state.

Whether General Maritime Law controls the question of prejudgment interest in a diversity action where the accident and injuries occurred on the territorial waters of a state.

Whether a consolidation for trial of a diversity action with an admiralty or a Jones Act action converts either of these actions into the other.

STATUTORY PROVISIONS INVOKED

(1) This case involves 28 U.S.C. 1961, 28 U.S.C. 1332, 46 U.S.C. 688.

(2) This case also involves Louisiana Revised Statutes 13:4203, L.R.S. 22:655, Louisiana Civil Code articles 2315 and 2316.

STATEMENT

This action was commenced on June 2, 1961 by petitioner, Felix Canova, filing his complaint in the United States District Court, Eastern District of Louisiana, New Orleans Division, and designated as Civil Action No. 11195. Petitioner in said action sued the Travelers Insurance Company, Employers Mutual Liability Insurance Company of Wisconsin and Baldwin-Lima Hamilton Corporation, all non-residents of the State of Louisiana. By virtue of the Louisiana Direct Actions Statute, suit was filed directly against the above named insurance companies and not against the alleged tort feasors. The Louisiana Revised Statute 22:655 provides in part as follows:

> "The injured person or his or her survivors or heirs hereinabove referred to at their option, shall have a right of direct action against the insuror within the terms and limits of the policy . . . ."

The Travelers Insurance Company a non-resident insurance company was the insuror of Canal Crane Service, Inc. and its employee Milton Elizar.

28 USC 1332 conferred jurisdiction on the Federal District Court since the claim exceeded $10,000.00 and there was diversity of citizenship between petitioner and defendants.

In 1961 when this action was filed, it was sufficient for the purpose of diversity if a complainant and the insuror of the offending defendant were not from the same state.

The Travelers Insurance Company was domiciled in the state of Connecticut and petitioner was a resident of the Parish of Ascension, State of Louisiana. Therefore, under the provisions of 28 USC 1332, diversity jurisdiction was acquired since petitioner's claim exceeded the sum of $10,000.00.

Petitioner's claim was predicated upon the negligence of Canal Crane Service, Inc. and its employee, Milton Elizar, who was operating the crane at the time it fell injuring petitioner. There was no Federal Statute conferring upon petitioner any right of action against The Travelers Insurance Company for his injuries. His right of action was acquired by virtue of Louisiana Civil Code, Articles 2315 and 2316.

The accident and injuries to petitioner occurred on a barge being operated within the territorial waters of the State of Louisiana in the Gulf of Mexico. This fact did not confer upon petitioner any right of action in Federal Court against Canal Crane Service, Inc. since Canal was not the owner or operator of the barge nor petitioner's employer. Petitioner had a separate right of action against the owner of the barge and his employer, the California Company. His action against the owner of the barge was under General Maritime Law for unseaworthiness. His action against his employer was under the Jones Act, 46 USC 688. Thus, he filed another action, being civil action no. 13,515 against his employer and the owner of the barge under the above Federal Statute and General Maritime Law.

The Trial Court under Federal Rule 42 consolidated for trial petitioner's actions against his employer and owner of the barge, both being the California Company, CA-13,515, and petitioner's separate action based on diversity against Travelers Insurance Company et als., CA-11,195. These actions were consolidated because there was a common question of fact involved in both complaints. Both arose out of the same accident.

The United States Court of Appeals for the Fifth Circuit affirmed the trial court and refused to award interest from date of judicial demand as provided by Louisiana Revised Statutes 13:4203. This decision is based primarily upon the conclusion that petitioner's claim did not remain a diversity action throughout the consolidated trial.

ARGUMENT

The facts as recited by the Court of Appeals shows the narrow question presented for review. Suit was filed against Travelers Insurance Company, hereinafter referred to as Travelers, by virtue of the Louisiana direct action statute and jurisdiction in the Federal District Court was invoked because there was diversity of citizenship. The injury to petitioner occurred on a floating barge within the territorial waters of the State of Louisiana.

Travelers contended in its answer petitioner was guilty of contributory negligence which should bar his recovery.

Under Louisiana law and under Federal law, contributory negligence is an affirmative defense. Louisiana Code of Civil

Procedure, Article 1005 and Federal Rules of Civil Procedure 8(c).

This principle of law is well established. Equally well established is the fact that he who urges an affirmative defense has the burden of so proving. Travelers did no more than urge in its answer the affirmative defense of contributory negligence. The Court of Appeals in its decision seems to have relieved Travelers from the continuous urging and proof of its affirmative defense and in fact placed the burden upon petitioner to so urge.

The Court of Appeals concluded that petitioner did not remain a diversity defendant after the consolidation of the instant case with that brought by petitioner under the Jones Act and under general maritime law. It is submitted that if petitioner's action against Travelers was a true diversity action at its inception, its consolidation did not change its character.

Fed. Rule 42, *Barron & Holtzoff*—Section 941 et seq.

Journapak Corp. v. Blair, 27 Fed. Rules Decision 509

Zdanok v. Glidden Co., 327 Fed. 2d 944

Koenig v. Frank's Plastering Co., 227 Fed. Supp. 849 (Judgment affirmed 341 Fed. 2d 1957)

Ellerman Lines Ltd. v. Atlantic Gulf Stevedores, Inc., 339 Fed.2d 673

It was incumbent upon Travelers, not petitioner, to see that the trial court applied the proper law as to contributory

negligence and did not apply the more liberal maritime law of comparative negligence.

The citing of *Newburgh Land & Dock Co. v. Texas Co.*, 227 F.2d 732 and *Moore-McCormack Lines, Inc. v. Amirault*, 202 F.2d 893 by the Court of Appeals as its authority for the denial of pre-judgment interest was erroneous.

Moore-McCormack Lines, Inc. v. Amirault involved a collision "on the high seas" between a fishing vessel and a freighter and personal injuries resulting therefrom. The Constitution of the United States and Admiralty jurisprudence are clear that an action arising on the high seas is exclusively controlled and governed by maritime law.

Judge Magruder, the organ of the court in *Moore-McCormack Lines, Inc. v. Amirault*, gives a detailed and comprehensive discussion of pre-judgment interest in an admiralty or maritime case. He discusses the fact that there might be diversity in an action under Federal Employers Liability Act, the Jones Act, Death on High Seas Act or a claim in admiralty for a grievance under general maritime law. Such fortuitous circumstances does not make the action a pure or typical diversity case. In such a situation it is obvious that the proper Federal statute or general maritime law would control even though there also happened to be diversity between the parties.

Judge Hand, the organ of the court in the *Newburgh Land & Dock Co. v. Texas Co.*, supra, erroneously used the case of *Moore-McCormack Lines, Inc. v. Amirault*, supra, as authority for his decision that state law does not control the date from which interest begins to run in a diversity action

where the injury arose in the navigable waters of the State. At page 735:

> "We confess that we do not find any certain guidance; but we accept the ruling of the First Circuit in Moore-McCormack Lines, Inc. v. Amirault, 202 F.2d 893, that even a state statute does not control the date from which interest shall begin to run, when the liability arises in the navigable waters of a state."

Newburgh Land & Dock Co. v. Texas Co., supra, is distinguishable because it involved damages to a floating dock by defendant's tug and barges and did not involve personal injuries. Both plaintiff's and defendant's status and damages were of a complete maritime nature. This is not true in the instant case.

It is submitted that the inquiry before this Court is controlled by the doctrine espoused in *Erie Railway Co. v. Tompkins*, 304 U.S. 64, 58 Sup. Ct. 817, LED 1188 and the multitude of cases which interpret this decision. The substantive laws of the state in which the accident occurred are to be applied by the Federal Court in a diversity action.

The only question before this court is whether petitioner was entitled to the interest as provided by LRS 13:4203. This Louisiana statutory provision expressly provides for interest at the rate of five percent (5%) per annum from date of judicial demand until paid in all ex delicto actions for damages.

The Honorable E. Gordon West, Judge, United States District Court for the Eastern District of Louisiana, New Orleans Division, gave a detailed discussion on prejudgment interest

in his opinion in *Duvernay v. Alcoa Steamship, Inc.*, 217 Fed. Sup. 698, 700:

> "The only question to be decided by this court concerns the date of the commencement of the accrual of legal interest to the plaintiff's recovery. Title 28 USCA, Sec. 1961 provides that interest shall run from date of entry of judgment. It has been held that in cases in Federal Court where jurisdiction is based upon diversity of citizenship, that the law of the state must apply. Woodmont, Inc. vs. Daniels, 10 Cir., 290 Fed. 2d 186. It has also been held that under Louisiana Law, the right to interest is a substantive right governed by State law and that according to the law of the State of Louisiana, that interest begins to run from date of judicial demand. However, in Federal cases where jurisdiction is based on Federal law rather than diversity, interest on a personal injury claim runs from the date of entry of judgment rather than from the date of judicial demand . . . . . thus, in the instant case which was predicated on a Federal statute, the Jones Act and upon maritime law, it is the opinion of the court that Title 28 USCA 1961 is controlling and that interest runs only from the date of entry of the judgment."

The reasoning of the Honorable Judge West is particularly applicable to the instant case since in part it dealt with a similar problem. Petitioner based his suit against Travelers completely on diversity of citizenship. It was not a suit under the Jones Act or General Maritime Law. Petitioner's suit was against the owner and operator of the crane which caused his injuries.

To further emphasize the point the petitioner's case against Travelers was not based upon a Federal statute or General Maritime Law, the following portions of the Honor-

able Judge Boyles' charges to the jury are particularly applicable:

> "We come now to the law applicable to the Plaintiff's alleged cause of action against the remaining defendants, the Travelers Insurance Company, the insuror of Canal Crane Service, Inc., Employers Liability of Wisconsin, insuror of Southern Equipment and Tractor Company, Inc. and Baldwin-Lima-Hamilton Corporation. Now, Plaintiff's claim against these defendants are based on the contention that the defendants were negligent. These claims **are not** based upon the **Jones Act** or upon the **warranty of unseaworthiness.** Therefore, you are instructed that as to these defendants, it is of absolutely no consequence whether the plaintiff was a seaman or member of the crew of a vessel or whether or not the plaintiff was owed the warranty of seaworthiness or whether or not the barge was, in fact unseaworthy." (TR 260) (Emphasis Supplied)

> "Now that plaintiff has sued the Travelers Insurance Company as I have told you, which is the insuror of Canal Crane Service, alleging that his injuries were proximately caused by the negligence on the part of Canal, its agents, officers or employees. Bear in mind again that Canal Crane Service **did not owe** plaintiff any duty under the Jones Act, since it was not the plaintiff's employer. Likewise, Canal did not owe plaintiff the **warranty of seaworthiness** since it was not the owner of the barge. Therefore, any liability of Travelers would have to be supported by finding, on your part, that negligence on the part of Canal was the proximate cause of plaintiff's injury." (TR 263) (Emphasis Supplied)

Also see the judge's charge as to Baldwin-Lima-Hamilton Corporation. (TR 266)

The above portion of the trial judge's charge makes it absolutely clear that petitioner's action was solely a diversity action based on negligence. The fact that the trial court also charged the jury as to comparative negligence and not contributory negligence should not change the character of petitioner's action. The burden of demanding the application of this affirmative defense was on Travelers and not petitioner. *Supra.*

The question of pre-judgment interest was also discussed in the following cases.

Joseph E. Bennett Co., Inc. v. Trio Industries, Inc., 306 Fed. 2d 546, 548:

> "The long established rule is that the question of interest prior to judgment is always one of state law."

Massachusetts Benefit Association v. Miles, 137 US 689, 691; 11 Sup. Ct. 234, 34 LED 834.

Collier v. Granger, 258 Fed. Supp. 717, was an action that was commenced by complainant filing a petition which alleged in a stock fraud case three claims for recovery, to-wit:

(1) defendant committed common law fraud and deceit.

(2) that defendant violated Sec. 17 of Security Act of 1933 as amended 15 USC 77q and

(3) claim based on diversity of citizenship.

There was a trial by jury with a verdict returned for complainant on all three claims. The Court at page 718 said:

"Insofar as the motion for pre-verdict interest is predicate upon the successful resolution of the diversity claim, the law of New York controls."

St. Clair v. Eastern Airlines, Inc., 302 Fed. 2d 477, 480 2d Cir. 1962;

Spanos v. Skouras Theatres Corp., 235 Fed. Supp. 1, 17 (S.D. Cir. 1964).

Thompson v. Staples, 341 Fed. 2d 536, involved a personal injury action which was filed after the Louisiana one year prescriptive period had elapsed. The court at page 536 states:

"Since jurisdiction in this case is based solely on diversity of citizenship, we are bound to apply the substantive law of Louisiana."

Louisiana & Arkansas Railway Co. v. Export Drum, Inc., 359 Fed. 2d 311, 316:

"Export Drum's major argument in favor of the District Court's ruling allowing interest only from the date of the judgment rests on the provisions of 28 USC 1961 which states in pertinent parts as follows:

" 'Interest shall be allowed on any money judgment in a civil case recovered in a District Court . . . . such interest shall be calculated from date of entry of the judgment, at the rate allowed by state law.' It is settled however that Sec. 1961 relates only to interest recoverable on a judgment itself. It has nothing to do with the question of whether prejudgment interest shall be allowed as part of the compensation awarded to make the injured party whole."

Mid States Oil Corporation v. Walker, 207 Fed. 2d 127 (5th Cir. 1953)

Moore-McCormack Lines, Inc. v. Amirault, 202 Fed. 2d 893 (1st Cir. 1953)

If 28 USC 1961 does not control the question of prejudgment interest, can it be said that Louisiana law does not control in a diversity case where the accident and injury occurred within the territorial jurisdiction of the State of Louisiana?

Can it be said that the consolidation for trial of a diversity action with an admiralty and/or Jones Act action converts either of these actions into the other?

Does the fact that a Federal Court has discretion in awarding interest in an admiralty case gives it the same discretion in a diversity action when the statutory law of a state expressly provides for interest from date of judicial demand?

The answers to these questions control the instant Petition.

The following cases are cited for the purpose of showing that in a diversity action, the substantive state law controls since the function of Federal Court in a diversity case is to apply state law and not make state law.

Erie Railway Company v. Tompkins, 304 US 64, 58 Sup. Ct. 817, 82 LED 1188

Home Indemnity Company v. Allstate Insurance Co., 393 Fed. 2d 593

Thomas v. Travelers Insurance Co., 258 Fed. Supp. 878

Ragan v. Merchants Transfer and Warehouse Co., 337 US 530, 69 Sup. Ct. 1233, 93 LED 1250

Hannah v. Plumer, 380 US 460, 85 Sup. Ct. 1136, 14 LED 2d 8

Guaranty Trust Co. v. York, 326 US 99, 65 Sup. Ct. 1464, 89 LED 2079

Palmer v. Hoffman, 31 US 109, 63 Sup. Ct. 477, 87 LED 645

Bird v. Blue Ridge Rural Electric Coop, Inc., 356 US 525, 78 Sup. Ct. 893, 2 LED 2d 953

Woodmont, Inc. v. Daniels, 290 Fed. 2d 186

Duvernay v. Alcoa Steamship Co., 217 F. Supp. 698

New Amsterdam Casualty Co. v. Waller, 167 Fed. 2d 767

Moore-McCormack Lines v. Amirault, et al., 202 Fed. 2d 893

Mid States Oil Corp. v. Walker, et al., 207 Fed. 2d 127

Hobart v. O'Brien, 243 Fed. 2d 735

Curry v. Fred Olson Lines, 367 Fed. 2d 921

CONCLUSION

In conclusion, it is respectfully requested that a writ of certiorari be granted and that this Honorable Court amend the judgment rendered in favor of petitioner, Felix Canova, against the Travelers Insurance Company in the sum of $50,493.00 to include interest from date of judicial demand, June 2, 1961, at the rate of five percent (5%) per annum as provided by Louisiana law.

Respectfully submitted,

D'AMICO, CURET & BUSH

By _____

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 25946

D. C. Docket No. CA 11,195

FELIX CANOVA,

Appellant,

versus

THE TRAVELERS INSURANCE COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEWIN and GODBOLD, Circuit Judges, and CHOATE, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Felix Canova, be condemned to pay the costs of this cause

in this Court for which execution may be issued out of the said District Court.

January 29, 1969

Issued as Mandate: Apr 7, 1969

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25946

FELIX CANOVA,
Appellant,

versus

THE TRAVELERS INSURANCE COMPANY,
Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING
(March 28, 1969)

Before GEWIN and GODBOLD, Circuit Judges, and CHOATE, Senior District Judge

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same, is hereby DENIED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25946

FELIX CANOVA,

Appellant,

versus

THE TRAVELERS INSURANCE COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(January 29, 1969)

Before GEWIN and Godbold, Circuit Judges, and CHOATE, Senior District Judge.

CHOATE, Senior District Judge: The narrow question presented by this appeal is whether appellant, plaintiff below, is entitled to pre-judgment interest as of right after he obtained a jury verdict against the appellee, Travelers. The issue turns on whether Louisiana law or the General Maritime law should be applied. Under Louisiana law, interest is recoverable as a matter of right from the date of judicial demand.[1] If the Maritime law applies the matter of pre-judgment in-

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[1] La. Rev. Stat. 13:4203.

terest rests with the sound discretion of the trial court.[2] The District Judge determined that the General Maritime law was applicable and in the exercise of his discretion, declined to allow pre-judgment interest.[3] Appellant does not contend that the District Judge's discretion was improperly exercised, should it be determined that his choice of law ruling was correct.

The pertinent facts may be briefly stated. Appellant was working on a barge off the coast of Louisiana, in territorial waters, when a crane on the barge fell and injured him. He sued the owner and operator of the barge under the Jones Act, and in a separate action (the instant case), he sued Travelers, the insurer of the owner and operator of the crane, under Louisiana's direct action statute.[4] Jurisdiction of this latter claim was based on diversity of citizenship and trial by jury was demanded. The two suits were consolidated and tried before a jury upon special interrogatories. The jury returned a verdict against both defendants in the amount of $50,000.

Appellant contends that Travelers remained a "diversity defendant" throughout, notwithstanding the consolidation of the two cases, and that substantive state law must therefore be applied. We cannot agree.

The record reflects that the entire trial of this case proceeded under the general principles of the Maritime law. As an example, the trial judge, in his charge to the jury, ex-

[2]See, *Haynes v. Reder; A/S Alladin*, 362 F.2d 345, 351 (5 Cir. 1966), and *National Marine Service, Inc. v. Talley*, 348 F.2d 589 (5 Cir. 1965).

[3]Interest was assessed from the date of judgment pursuant to 28 U.S.C. § 1961.

[4]La. Rev. Stat. 22:655.

plained that the usual Louisiana rule regarding contributory negligence, as they might know it, did not apply but that appellant's contributory negligence, if any, would only serve to diminish his recovery in proportion to his negligence. Traveler's defense of contributory negligence as a complete bar was disregarded. Of course, these rulings were all to the benefit of the appellant. In these circumstances, it is clear that Travelers did not remain a "diversity defendant" throughout. On the contrary, it was subject to the less favorable principles of the Maritime law as fully as if the case had been instituted under the admiralty jurisdiction of the court.

In *Newburgh Land & Dock Co. v. Texas Co.*, 227 F.2d 732 (2 Cir. 1955), it was held that state law does not control the date from which interest shall begin to run in a diversity case when the cause of action arose in the navigable waters of a state. Similarly, in *Moore-McCormack Lines, Inc. v. Amirault*, 202 F.2d 893 (1 Cir. 1953) a state statute providing for prejudgment interest was not applied in a diversity case when the claim was based on a maritime tort. That case was tried under the General Maritime law and the court characterized the existence of diversity as a "fortuitous circumstance"[5] that did not compel the application of the state interest statute.

We find these principles to be applicable to the case at bar. The cause of action arose on navigable waters and the case was litigated under the Maritime law. The trial judge

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[5]The instant suit was filed in 1961. We note, in passing, that had the 1964 amendment to 28 U.S.C. 1332 been in effect, there would not have been diversity jurisdiction regarding Travelers. By that amendment, the citizenship of the actual tort-feasor must be taken into account in a direct claim. In this case, both the plaintiff and the crane company, Traveler's' insured, were Louisiana citizens.

was therefore correct in looking to that same body of substantive law to determine the propriety of awarding interest before judgment.

AFFIRMED.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing petition has been served on 1) The United States Court of Appeals for the Fifth Circuit, State of Louisiana,

2) The United States District Court for the Eastern District of Louisiana, New Orleans Division,

3) Robert B. Acomb, Jr. of the law firm of Jones, Walker, Waechter, Poiterant, Carrere & Denegre, New Orleans, Louisiana, attorneys for Travelers Insurance Company, by depositing same in the U.S. mail, with first class postage prepaid, and properly addressed to the respective addresses.

Baton Rouge, Louisiana, this _____ day of June, 1969.

_____

Sam J. D'Amico